Oklahoma City Collection District of Browning-Ferris, Inc. *and* American Federation of State, County and Municipal Employees, Local 2406, AFL-CIO. Cases 16-CA-9412 and 16-RC-8198

July 30, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 3, 1981, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Oklahoma City Collection District of Browning-Ferris, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election conducted in Case 16-RC-8198 be, and it hereby is, set aside and that a new election be conducted as set forth in the direction below.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: These consolidated cases were heard before me in Oklahoma City, Oklahoma, on July 16, 1981, pursuant to a complaint, dated November 25, 1980, issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 16 of the Board in Case 16-CA-9412, and the December 18, 1980, order consolidating cases and directing hearing issued by the Acting Regional Director for Region 16 in Case 16-RC-8198.

The complaint is based on a charge filed by American Federation of State, County and Municipal Employees, Local 2406, AFL-CIO (herein called Local 2406, the Union or the Petitioner), against Oklahoma City Collection District of Browning-Ferris, Inc. (herein referred to as Respondent, Employer, or BFI). In the complaint the General Counsel alleges that Respondent has violated Section 8(a)(1) of the Act by interrogating employees, threatening employees with loss of benefits, creating an impression of surveillance, and soliciting employee grievances to be solved without the help of a union.

By its answer, Respondent admits certain allegations, but denies that it has violated the Act in any manner.

The petition in Case 16-RC-8198 was filed September 5, 1980,[1] and, pursuant to a Stipulation for Certification Upon Consent Election approved on October 6, 1980, an election by secret ballot was conducted on November 6, 1980, among the employees in the unit stipulated to be appropriate.[2]

Upon conclusion of the balloting, the parties were furnished a copy of the tally of ballots which shows that of approximately 115 eligible voters, 50 cast ballots for the Petitioner and 52 cast ballots against the labor organization. There were no void or challenged ballots. The Petitioner filed timely objections, seven in number, to conduct affecting results of the election.

Objections 1 and 2 were withdrawn. In his December 18, 1980, report on objections, the Acting Regional Director observed that "The issues raised by Petitioner's Objections 3, 4, 5, and 6 are coextensive with the unfair labor practice allegations" contained in the November 25, 1980, complaint issued in Case 16-CA-9412. He therefore consolidated these objections with the complaint case for hearing. Although the Petitioner's objec-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the absence of exceptions we adopt, *pro forma*, the Administrative Law Judge's overruling of Petitioner's Objection 4.

In adopting the Administrative Law Judge's conclusions that the speech delivered by District Manager Solheid on October 30, 1980, and his followup letter of October 31 constituted objectionable conduct, we find it unnecessary to decide whether such conduct would, if alleged as such, constitute a violation of Sec. 8(a)(1) of the Act. We do find that Respondent's repeated references to strikers in other companies and in other divisions of its parent company and the resulting loss of jobs to the strikers, made in the context of other objectionable conduct including threats, "had a coercive impact on employees by tending to create the impression that such adverse consequences would be a direct result of unionization." *Liquid Transporters, Inc.*, 257 NLRB 345 (1981). Accord: *General Dynamics Corporation*, 250 NLRB 719, 722-723 (1980).

Member Hunter agrees with the Administrative Law Judge that Petitioner's Objection 6 should be sustained and, accordingly, finds it unnecessary to pass on his disposition of Objection 7.

The Administrative Law Judge inadvertently omitted from his Conclusion of Law 3 Respondent's creation of the impression of surveillance as a violation of Sec. 8(a)(1).

[1] Such date opens the preelection "critical" period. *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962).

[2] The stipulated appropriate unit is:

All drivers, mechanics, helpers and shop employees employed by the Employer at its facility in Oklahoma City, Oklahoma, excluding all other employees, office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

tions also include, as count number 7, an "other acts" allegation, at the hearing it announced, at the General Counsel's resting, that it had no further evidence to offer in either the "C" case or on the objections, and it rested.

Upon the entire record in this consolidated proceeding, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel,[3] I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with a solid waste management facility located in Oklahoma City, Oklahoma, is engaged in the business of solid waste disposal. Its operation utilizes two basic divisions, residential and commercial, plus a shop with mechanics to service its vehicles. During the preceding 12 months, Respondent purchased and received goods valued in excess of $50,000 directly from points outside the State of Oklahoma. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits, and I find, that Local 2406 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

There are five complaint allegations of unlawful interference, restraint, and coercion. Three pertain to Assistant District Manager Philip Miesner and one each to District Manager Lee Solheid and Operations Manager Terry Laffoon.

Miesner primarily oversees the residential operation. He has two route supervisors in charge of the drivers. Nevertheless, Miesner apparently has substantial direct contact with the residential employees, for driver-collector Claude L. Jackson testified that if he has any work problems, he goes to Miesner and feels at ease discussing matters with him. Operations Manager Terry Laffoon primarily oversees the commercial division.

B. *Background of Organizing Campaign*

Formal organizing among Respondent's employees began when driver-collector Claude L. Jackson contacted a union steward for Oklahoma City. The steward advised Jackson to contact Emileo Molleda, Jr., business agent for Local 2406, and Jackson did so. Molleda gave him cards to get signed. Between then and the election, there were five union meetings with the initial one being held on Wednesday, August 27, at which 18 employees attended.

[3] The Charging Party's representatives filed no brief.

C. *Incidents of Interference, Restraint, and Coercion*

1. Assistant District Manager Philip Miesner

a. *Late August 1980 telephone call to Oliver*

It is undisputed that in late August 1980[4] Miesner telephoned residential truckdriver Spencer Oliver at home and briefly spoke with him. Miesner contends that he called Oliver to arrange for him to work the following day. If the complaint allegation of August 29 is correct, the next day would have been a Saturday. The record reflects that the regular workweek is Monday-Tuesday and Thursday-Friday. Oliver concedes that the call could have been on a Tuesday, although arrangements to work on off days are almost always discussed at the job.[5]

I credit Oliver's testimony that nothing was said about his working the following day. In resolving this credibility issue I have considered Oliver's possible bias from the fact he was discharged by Respondent on September 26. Oliver testified in a forthright fashion and stated that he harbors no ill feeling against BFI over his termination.

Oliver and Miesner agree that the latter did ask Oliver if he knew of a union organizing among the employees. Miesner testified, and I credit this portion of his testimony, that he had heard rumors of union card signing and so he therefore asked Oliver about it. Oliver responded, untruthfully, that he knew nothing of any such activity. Miesner asked whether Oliver was telling the truth, and the latter responded, "Why should I lie?"

In fact, Oliver was active in the card signing, but he responded untruthfully to Miesner because he felt the matter was none of Miesner's business. On cross-examination Oliver admitted that the tone of the conversation was friendly.[6]

Although Miesner expressed no threats in his conversation with Oliver, the absence of such is immaterial. *Gossen Company, a Division of the United States Gypsum Company*, 254 NLRB 339 (1981); *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by Miesner's late August interrogation of Oliver as alleged in complaint paragraph 7(a). As the event predated the opening of the critical period, it may not serve as a basis for setting aside the election. *Goodyear Tire and Rubber Company, supra.*

b. *Office conversation with Oliver in late August 1980*

Still hearing rumors of union activity, including Oliver association with the activity, Miesner, about 3 days after the telephone conversation,[7] called Oliver into an office and inquired into the matter again. Just the two were present. While Miesner could not remember what he

[4] All dates are in 1980, unless otherwise indicated.

[5] Oliver testified that Miesner had called him at home only once previously concerning working the next day.

[6] Interrogation is no less coercive simply because the tone is friendly. *Cagle's, Inc.*, 234 NLRB 1148, 1150 (1978), enfd. in pertinent part 588 F.2d 943 (5th Cir. 1979).

[7] This second conversation could have been in the first 2 or 3 days of September.

asked Oliver, the latter testified that Miesner asked him whether he was sure that nobody was trying to start a union, for Oliver's name had come up as the one trying to organize it.

This time Oliver told him that some employees were in fact trying to start a union. Miesner inquired whether he could sit down and talk with the employees to see what they need and whether Miesner could give them what they needed. Oliver replied that he did not think so because the employees needed too much. Oliver also told Miesner he should quit pushing people or he would have a suit filed against him. Oliver had no particular legal action in mind, but said that just to get Miesner off his back.

Miesner's version is that Oliver responded to the former's question by saying he was not initiating anything and did not want to get involved. Miesner contends that the conversation about the Union ended at that point—although he admits it lasted a couple of minutes. Miesner did not impress me favorably, and I do not credit him.

Although Oliver testified on cross-examination that he did not feel coerced by the office interrogation, actual coercion is not the test of whether an interrogation (or other employer conduct) violates Section 8(a)(1) of the Act. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employees' rights under the Act. *Continental Chemical Company*, 232 NLRB 705, 706, fn. 4 (1977). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by the late August-early September office interrogation of Oliver by Miesner as alleged in complaint paragraph 7(b).[8]

Respecting the solicitation of grievances, the subject of paragraph 7(c), I credit Oliver and I find that Respondent violated Section 8(a)(1) of the Act by Miesner's office conversation with Oliver in which Miesner solicited employee grievances with the implied promise of correcting them. *Continental Kitchen Corporation*, 246 NLRB 611 (1979).

c. *Route conversation with Jackson*

Claude L. Jackson has been a driver-collector with Respondent for 5 or 6 years. Miesner admits that he had a conversation about the Union with Jackson on the latter's route, but he could not recall even approximately when it was. Although Jackson initially placed the conversation in late September or early October, because it was "right before the election," he later admitted that he had stated in his October 8 pretrial affidavit (Resp. Exh. 1) that his conversation with Miesner occurred "soon after" the first union meeting of August 27. He testimonially confirmed the accuracy of his affidavit, but contended that "soon after" was not a "couple of days" and could have been a month later.[9] As Jackson gave his pretrial affidavit on October 8, I find it more probable than not that the "soon after" the August 27 union meeting meant no more than a handful of days. Had it been a month later, the phrasing in the affidavit no doubt would have been language such as "a week or so ago. . . ." Moreover, the pertinent complaint allegation is paragraph 7(c),[10] and it alleges the event to have occurred about August 29—a time predating the critical period. I find such date to be substantially accurate.

As for the substance of the conversation, Jackson testified that Miesner pulled him aside from the other employee on the truck that day and asked him whether the employees were trying to organize a union and (if so) that he would like to work something out with them. Jackson told him it was up to the men. He admits that Miesner did not promise to take care of any concerns of the employees, that the tone of the conversation was friendly, and that he regularly and freely discusses work problems with Miesner. On the other hand, Jackson testified that Miesner usually does not come by checking with Jackson.

Miesner testified that he told Jackson he was aware of rumors of union activity, and he asked Jackson if he knew why the employees felt that they needed someone to represent them. He also asked what the employees felt they were not getting. According to Miesner, Jackson responded that wages and sick pay were two major items the employees wanted improved. He testified that he did not intend to give Jackson any impression that these matters would be taken care of by a higher official. He also testified that he asked Jackson whether the Union had made any promises on the subjects of wages and sick pay and that his purpose in so asking was to inform Jackson that no one can make such promises. Jackson's answer, if any, was not described by Miesner. The conversation lasted but a couple of minutes.

I credit Jackson rather than Miesner, although under either version an unlawful interrogation occurred as alleged in paragraph 7(c). Miesner's asking to work something out with the employees also constitutes the solicitation of employee grievances with an implied promise of correcting them. Such conduct is unlawful as also alleged in paragraph 7(c) of the complaint, and I find that Respondent violated Section 8(a)(1) of the Act by such conduct.

2. Operations Manager Terry Laffoon

Driver Spencer Oliver also described a remark by Operations Manager Terry Laffoon. As Oliver was passing the garage area before noon about 3 weeks before his September 26 discharge (or about Friday, September 5), Laffoon remarked, "There goes that union man." Two or three mechanics were working in the vicinity, but Oliver does not know whether they heard Laffoon. Although Oliver admitted that Laffoon was smiling when he uttered the remark, he also testified that one does not

[8] Although par. 7(b) alleges the event to have occurred about September 7, the evidence reflects that the incident occurred before September 5. The event therefore predates the critical period. Finally, the time is sufficiently close to the complaint allegation insofar as notice to Respondent is concerned.

[9] It is understandable that the witnesses had difficulty recalling the dates of events, for at the time of this hearing almost a year had elapsed since the initial union meeting.

[10] As represented by the General Counsel.

know when Laffoon is joking and that he is not really known to joke around. When asked on cross-examination whether he felt threatened by Laffoon's remark, Oliver testified, "Sir, I don't feel threatened by anything." Laffoon denied making any such remark to Oliver and testified that they have a friendly relationship.

There is no evidence that Oliver was wearing a union button or had otherwise made public his union activities.

I find, as alleged in complaint paragraph 7(e), that on September 5 (within the critical period) Operations Manager Laffoon did make a remark to Oliver, singling out his union activities, thereby tending to create the impression that Oliver's union activities were under surveillance by Respondent.

A similar incident occurred in *The Gates Rubber Company*, 182 NLRB 95, 97 (1970), and the allegation was dismissed. I would find *Gates Rubber*, cited by Respondent, persuasive except for the fact that it no longer applies in light of cases such as *PPG Industries, Inc., supra*, 251 NLRB 1146 (1980).

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by such conduct. *Franklin Fouts, d/b/a B & F Cartage*, 251 NLRB 645 (1980).[11]

3. District Manager Lee Solheid

a. *Late September or October 9 speech to employees*

Driver Claude Jackson also described a speech District Manager Solheid gave to the employees in groups. Jackson initially was vague about the date of the meeting, but cross-examination based on his pretrial affidavit (Resp. Exh. 1) of October 8 established that the meeting was held 1 or 2 weeks before he gave the affidavit.[12] Solheid already was speaking to about 15 to 20 employees in the office area when Jackson arrived. According to Jackson, whom I credit, Solheid was telling the employees that he had heard they were getting a union together and that he did not approve of it, that the employees would *lose* their Christmas bonus, wages would probably drop to minimum wage if the Union came in and bargaining would *start from there.*

On cross-examination Jackson confirmed the accuracy of the version in his pretrial affidavit:

> He [Solheid] said he had received a notice from the union an election would be held. Solheid said that if the union came in our wages would drop to minimum wage and that we would lose all our benefits, including the Christmas bonus. He told us about 18 per cent of the population belongs to unions.

Jackson testified that Solheid had a sheet of paper which he referred to, as was his custom whenever he addressed the employees, but that he just glanced at it a few times. He denied that Solheid said that wages and benefits were subject to negotiation, and repeated his testimony that Solheid said wages would drop to minimum wage if the Union came in, that bargaining would start from there and that the employees would lose their Christmas bonus.

Jackson testified that there were no questions asked by employees in his group at the end of Solheid's talk.

Driver Terry M. Webster placed the meeting in early October and explained that it was a special meeting and not the regular monthly safety meeting. He testified that the meeting was held before his October 8 affidavit. He was present for Solheid's entire speech; he stated he was in the second group called to the front office lobby and that about 20 employees were present.[13] Webster testified that Solheid told them that he had heard they were trying to get a union in; that he wanted the employees to vote the way they wished; and that if the Union came in, all their benefits and everything would be gone and negotiations would start at minimum wage.

Respondent elicited the following from Webster on cross-examination: That Webster had received literature mailed by BFI to employees during the campaign, including a letter dated October 14 (Resp. Exh. 20);[14] that Solheid said there would be no guarantees of any certain wages or benefits if the Union came in; and that wages would be subject to negotiation. After again testifying that Solheid said bargaining on wages would *start* from the minimum wage, counsel secured Webster's acknowledgement that what Solheid said at the meeting is "pretty much the same" as that which is contained in the third paragraph of the October 14 letter, to wit:

> The law of the United States of America says that if the union gets the most votes in a proper election, the Company representative must sit down and *bargain*, in good faith, on all proper subjects—including wages, holidays, uniforms, Christmas bonuses and hours of work, just to name a few—that are conditions of employment. That doesn't mean you will keep the same benefits or that you will get more or less. It means *only* that we—the Company, me and our lawyer—will bargain, in good faith, over all these subjects.

[11] At p. 16 of its brief, Respondent asserts that even if I find that Laffoon made the remark, the matter is moot since Oliver was terminated before the election, and there is no evidence Oliver mentioned the matter to other employees. To the extent this argument goes to the pending objections, Respondent appears to be correct. The Board presumes that unlawful statements of a serious nature (i.e., discharge, plant closure, etc.) are disseminated among employees, and the burden in such cases is on the employer to show that no dissemination occurred. *Richard Tischler, Martin Bader and Donald Connelly Sr., a limited partnership d/b/a Devon Gables Nursing Home; Richard Tischler, Martin Bader and Donald Connelly Sr., a limited partnership d/b/a Devon Gables Lodge & Apartments*, 237 NLRB 775, 776-777 (1978), enfd. 615 F.2d 509 (9th Cir. 1980). Laffoon's remark would not appear to fall within the definition of "serious." I conclude that it is not entitled to a presumption of dissemination, and therefore does not serve as a ground for setting aside the election as alleged in Objection 4.

[12] Complaint par. 7(d), the pertinent allegation, alleges that "Respondent, by Lee Solheid, on or about October 1, threatened the employees with a loss of benefits and reduction of wage rates if the Union was voted in." Although October 1, having been a Wednesday, is not the correct date, it apparently is close enough to the actual date. Respondent disputes the date, asserting that it occurred about October 9. As I find *infra*, whether these were different speeches is immaterial.

[13] Jackson stated that he was in the second or third group.

[14] Jackson testified that he did not receive any mailings, and Solheid conceded that some letters were returned by the postal service.

Solheid testified that he gave his first speech on October 8[15] in the office reception area to four groups of employees. Initially testifying that he did not depart from his one and one-half-page text (Resp. Exh. 3), he subsequently conceded on cross-examination by National Representative Patrick that he did not read it word for word but only partially.[16]

The written text asserts that Solheid had declined a recognition request by representatives of the Union some 3 weeks earlier; that since then an National Labor Relations Board election had been agreed to for November 6; that there have been a lot of unfounded rumors; and it contains the following paragraph:

> What the election means is that if a majority of those who vote, vote for the union, then the union will act as your representative to sit down and negotiate with the Company's lawyer and myself to try and agree on a contract. That is all it means. We'll sit down and bargain, in good faith. We don't have to agree to anything we don't want and neither does the union. Nothing is automatic. There is no guarantee of wages . . . other than the minimum wage . . . of holidays, vacations, insurance, hours of work or anything else. It's a whole new ball game. I can promise you one thing—our lawyer isn't going to agree to anything that I don't think is in the best interest of the Company.

The text concludes by asking if there are any questions. According to Solheid, each group inquired whether employees had to join the Union if it were voted in, and that the second and third groups asked whether there had been any progress on a credit union; what percentage of workers are unionized; and whether it was true that the employees would not earn less than city employees. To the latter question, Solheid assertedly told them that he was not promising anything except good-faith bargaining, and that the only thing guaranteed by Federal law is the minimum wage.

Notwithstanding the written texts set forth above, and Solheid's testimony that he did not threaten to reduce wages or benefits,[17] on cross-examination by National Representative Patrick concerning what Solheid said about the minimum wage at the October 9 meeting, Solheid answered:

> What brought up the point of minimum wage was that there was no guarantee or promises and that there had to be a starting point, and at the negotiating table *that minimum wage would be the starting point by law.* [Emphasis supplied.]

On redirect examination Solheid stated that he did not believe he referred to a starting point in his talk and that he had adhered to the prepared text which he had used in many hours of rehearsal.[18]

[15] On cross-examination, he changed this to October 9 since October 8 is a Wednesday when employees normally are off work.

[16] Miesner and Laffoon confirm that he did not read the text word for word.

[17] Miesner and Laffoon also deny that Solheid made any such threat.

[18] Yet even his answer on direct examination referred to bargaining "beginning" at the minimum wage.

It seems clear, and I find, that Solheid became confused in delivering the prepared text (which he admittedly did not read word for word) and told the assembled employees essentially what Jackson and Webster heard him say—bargaining on wages would start *from* the Federal minimum wage. I also find that in such talk Solheid also told the employees that wages would be reduced to the minimum wage if the Union came in and that the Christmas bonus would be eliminated.

I find it unnecessary to resolve the question of whether Solheid delivered a similar speech in late September or around October 1. The October 8 affidavits of Jackson and Webster describing such a speech, and the October 9 speech not yet having been delivered, seem to compel a conclusion of an earlier talk. However, as the gist of the credited testimony applies to both speeches, I need dwell no longer on the topic, and I shall confine my findings to the date of October 9.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by Solheid's threats on October 9 as alleged (sufficiently close in time) in paragraph 7(d) of the complaint. *Taylor-Dunn Manufacturing Company*, 252 NLRB 779 (1980); *Centre Engineering, Inc.*, 246 NLRB 632 (1979).

b. *October 30 speech and October 31 letter*

Solheid gave another speech (Resp. Exh. 5) at the regular safety meeting on October 30. The General Counsel announced that she was not seeking to amend the complaint to add an allegation concerning the speech Solheid gave at the meeting. Nevertheless, I shall consider the speech, and Solheid's October 31 followup letter, in conjunction with the Petitioner's "other acts" objection.

In the speech Solheid spoke about a number of economic matters and also referred to strikes. He advised employees that Respondent would continue to operate in the event of a strike, and (p. 2):

> Naturally we'd have to hire new people—they're called permanent replacements—to take the *jobs* of all those who go on strike. . . . [Emphasis supplied.]

And (p. 2):

> The bad thing is—in a strike—almost everybody loses—employees stand to lose their jobs. . . .

And further (pp. 2-3):

> I wouldn't be fair to you if I let that go by without explaining to you what BFI companies do in a strike situation—it happened last summer in Baltimore, Maryland—about 90 people listened to the union and went on strike—*today* that company is nonunion, *only 6* of those 90 employees who were there before the strike are still working there, and the trash got picked up—unfortunately, almost 85 people lost their jobs to permanent replacements—a similar thing happened about 2 years ago in St. Louis. . . .

Solheid's October 31 followup letter to employees reiterated the foregoing theme of job loss in the event of a strike by stating (Resp. Exh. 4):

> Yesterday, I explained to you that the only weapon the union has to try to force the Company to agree to its demands is to call you out on strike. I also told you if a strike occurs, we will have to maintain service and pick up the trash to keep our customers, including the City. In the beginning, this will be done with supervisors and other experienced people from other BFI companies. They will train people we will hire as *permanent* replacements for those who go on strike. As I'm sure you know, we do not want this—it is not good for the Company and certainly it is not good for any employee who *loses his job* to a permanent replacement. Recently, this happened at a large BFI company in Jackson, Mississippi; about a year ago in Baltimore, Maryland; and about three years ago in St. Louis. Let's not let this happen to us—vote NO next Thursday and keep the outsider union out of our Company. [Emphasis supplied.]

Stressing loss of jobs to permanent replacements, with not even a reference to economic strikes, much less an explanation of the distinction between economic strikes and unfair labor practice strikes, or even of the residual job rights retained by permanently replaced economic strikers, is viewed by the Board as an illegal threat to discharge strikers and therefore violative of Section 8(a)(1) of the Act. *George Webel d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815, 818 (1975).[19] It is well settled that conduct which is violative of Section 8(a)(1) is, *a fortiori*, objectionable conduct. *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1786 (1962).

Accordingly, I find that the October 30 and 31 threats of job loss constitute "other acts" of objectionable conduct and serve as additional grounds for setting aside the election of November 6.

IV. THE PETITIONER'S OBJECTIONS TO THE ELECTION

The Petitioner's Objections 3, 4, and 5 relate to the conduct of Miesner and Laffoon discussed above. None of Miesner's conduct occurred within the critical period, and Laffoon's September 5 remark has been found to be unavailable as a ground for setting aside the November 6 election.

It is true that the Board has held that prepetition conduct may be considered in determining whether a party has engaged in objectionable conduct where such prepetition conduct lends "meaning and dimension" to postpetition conduct. *Blue Bird Body Company*, 251 NLRB 1481, fn. 2 (1980). Nevertheless, the prepetition event does not itself constitute an independent act of objectionable conduct.

This leaves the October speeches and letters of District Manager Solheid as findings of fact in support of Objections 6 (threat of loss of benefits and a decrease in wages) and 7 ("By the above and other acts . . . ."). Based on the foregoing findings supporting Objections 6 and 7, I shall recommend that the election herein be set aside, that the Regional Director conduct a second election to determine the question of representation, and that the Regional Director include in the notice of election the *Lufkin Rule* paragraph set forth in attached Appendix A.[20]

Upon the basis of the foregoing findings of fact, and the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 2406 is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating employees about their union activities, soliciting their grievances with an implied promise to correct them, and threatening to eliminate the Christmas bonus benefit, and reduce wages to the Federal minimum wage if employees selected the Union to represent them, Respondent has violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. By engaging in the conduct described above in section IV of this Decision, Respondent has interfered with its employees' freedom of choice in the election conducted November 6, 1980.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Oklahoma City Collection District of Browning-Ferris, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union membership, activities, and desires.

(b) Unlawfully soliciting employee grievances with an implied promise of correcting same.

[19] Cases holding strike replacement remarks to be lawful involve situations where the employer gave an adequate explanation of employee reinstatement rights, or differentiated between an economic strike and an unfair labor practice strike, or otherwise diluted the raw impact of a blunt remark. An example of an "explanation" case is *Liberty Nursing Homes, Inc., d/b/a Liberty House Nursing Home*, 236 NLRB 456, 459 (1978).

[20] *The Lufkin Rule Company*, 147 NLRB 341 (1964); *Bush Hog, Inc.*, 161 NLRB 1575 (1966); *Associated Milk Producers, Inc.*, 255 NLRB 750 (1981).

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Threatening its employees with elimination of their Christmas bonus and to reduce wage rates to the Federal minimum wage in the event they bring in American Federation of State, County and Municipal Employees, Local 2406, AFL-CIO.

(d) Engaging in conduct tending to create the impression among employees that their union activities are under surveillance.

(e) In any like or related manner interfering with, restraining, or coercing employees with respect to their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Oklahoma City, Oklahoma, facility copies of the attached notice marked "Appendix B."[22] Copies of said notice on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Regional 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held November 6, 1980, in Case 16-RC-8198 is hereby set aside and that said case be remanded to the Regional Director for Region 16 for the purpose of conducting a new election, and that the paragraph set forth in attached Appendix A be included in the notice of second election to be issued by the Regional Director.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

The election conducted on November 6, 1980, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives you the right to cast your ballots as you see fit, and protects you in the exercise of this right, free from interference by any of the parties.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The National Labor Relations Act gives you, as employees, the right:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate you concerning your union membership, activities, and desires.

WE WILL NOT unlawfully solicit your grievances with an implied promise to correct them.

WE WILL NOT engage in conduct which tends to create the impression that we have your union activities under surveillance.

WE WILL NOT threaten to eliminate the annual Christmas bonus or to reduce your wage rates to the Federal minimum wages in the event you bring in American Federation of State, County and Municipal Employees, Local 2406, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you with respect to your rights guaranteed by Section 7 of the National Labor Relations Act.

OKLAHOMA CITY COLLECTION DISTRICT
OF BROWNING-FERRIS, INC.